

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOSE CARLOS DUARTE, *
Plaintiff *

V. *

CIVIL ACTION
NO. 1:05CV11725 JGD

PUB 106, INC. and *
DANA COLBY, *
Defendants *

**AFFIDAVIT OF DANA H. COLBY IN SUPPORT OF THE MOTION
TO SET ASIDE THE DEFAULT JUDGMENT**

I, Dana H. Colby, being duly sworn, depose and say:

1. Pub 106, Inc., is a small restaurant and tavern located at 1300 Plymouth Street, East Bridgewater, Massachusetts. The restaurant is legally organized as Pub 106, Incorporated and I am the President and Treasurer of the corporation. The restaurant is located at 1300 Plymouth Street, East Bridgewater, and has been located at that address since its inception.

2. Jose Duarte worked for me as a dishwasher. Mr. Duarte was fired in March, 2005, for inappropriate conduct that the female employees found to be offensive.

3. Sometime at the end of June or early July, 2005, I started receiving telephone calls from a young attorney claiming to represent Jose Duarte. He claimed that Mr. Duarte was unlawfully fired and that he was not paid overtime to which he claimed he was entitled. I disputed the allegations with the attorney who then told me he was going to file suit. All of the telephone calls were made to me at the restaurant located at 1300 Plymouth Street, East Bridgewater.

4. Thereafter, I never heard from Mr. Duarte or any lawyers claiming to represent him until I was served an Order to Appear in Court in June, 2006. The notice was served on me by a constable at the restaurant at 1300 Plymouth Street, East Bridgewater, Massachusetts.

5. When I stopped hearing from the lawyers claiming to represent Mr. Duarte, I inquired of the people who knew Mr. Duarte as to what he planned to do. I was told that Mr. Duarte had returned to the old country and that they hadn't heard from him. I thus assumed that Mr. Duarte was not pursuing the action since he had left the country and I did not pursue the matter further until I received the Notice to Appear in June, 2006.

6. My Counsel reviewed the papers in this case and advised me that the Complaint and Summons were served in-hand to a Dana H. Colby, Jr., at 650 Plymouth Street, East Bridgewater, Massachusetts 02333. I was also told that a Notice of Default was sent to that same address and that, furthermore, that Mr. Duarte's attorney sent notice of a Motion for a Default Judgment to me and the restaurant at the 650 Plymouth Street, East Bridgewater, Massachusetts, address.

7. There is no person known to me to be Dana H. Colby, Jr. I am not a junior nor have I ever been known to anyone as Dana H. Colby, Jr. I do have a grown son, Michael, who is not named Dana H. Colby Jr., and has never been known to anyone as Dana H. Colby, Jr. Furthermore, my son, Michael, does not work for me and would have no reason to be on the premises of 1300 Plymouth Street, East Bridgewater, Massachusetts or 650 Plymouth Street, East Bridgewater, Massachusetts, other than to visit with me.

8. 650 Plymouth Street, East Bridgewater, Massachusetts is a small, retail strip mall in which I have an interest. Up to several years ago, I used to maintain a small office at 650 Plymouth Street, East Bridgewater, Massachusetts, which was staffed part-time by a

secretary. The office was there for purposes of managing the strip mall and for running a small trucking and real estate development business, which I maintained during the late 1990s. I subsequently closed the real estate development business and the trucking business and devoted my full-time energy to running Pub 106. The office at 650 Plymouth Street has been closed for several years now. There is no box, receptacle or other site to receive mail or service at 650 Plymouth Street.

9. I was never served with a copy of the Summons and Complaint in this matter nor did I ever receive notice of the default nor the Motion for Entry of Default Judgment, which was, apparently, served at 650 Plymouth Street, East Bridgewater, Massachusetts 02333. The only communication I had with Counsel for Mr. Duarte was when he called me at the restaurant at 1300 Plymouth Street and when I was served at the restaurant at 1300 Plymouth Street with the Notice to Appear before the Court in June, 2006. Once I received the Notice to Appear, I contacted my attorney who then appeared with me in Court on June 28, 2006.

10. I believe I have good and legitimate defenses to Mr. Duarte's claim as well as potential counterclaims for his conduct, which led to his being fired.

Signed this _____ day of July, 2006.

/s/Dana H. Colby

DANA H. COLBY

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS

July _____, 2006

Then came the above-named, Dana H. Colby, and hereby makes oath that he has read the above Affidavit and hereby states that the contents thereof are true of his own personal knowledge, except as to those items which are stated to be upon his knowledge and belief as to those items he believes them to be true.

/s/Donald J. Kaiser,

Donald J. Kaiser, Notary Public

My Commission Expires:_____